FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 10 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 50

THE UNITED STATES, *Petitioner*

v.

THE HOWARD P. FOLEY COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR RESPONDENT

ALEXANDER M. HERON
WILLIAM L. OWEN
Attorneys for Respondent.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Opinion Below	1
Jurisdiction	1
Question Presented	2
Statement	2
Summary of Argument	5
Argument	6
Conclusion	14

TABLE OF CASES.

American Surety Co. v. Pauly, 170 U. S. 133	11
Calderon v. Atlas S. S. Co., 170 U. S. 272	11
Carroll v. United States, 76 C. Cls. 103	9
Crook Company v. United States, 270 U. S. 4	6, 7
Gillen Co. v. United States, 88 C. Cls. 347	9
J. L. Young Engineering Co., Ltd. v. U. S., 98 C. Cls. 310	9
Karno-Smith Co. v. United States, 84 C. Cls. 110	9
Largura Construction Co., Ltd. v. United States, 88 C. Cls. 531	9
M. Cain Co. v. United States, 79 C. Cls. 290	9
Maryland Dredging Company v. United States, 241 U. S. 184	9, 11
Mueller v. United States, 113 U. S. 153	9
Newport News Shipbuilding Co. v. United States, 79 C. Cls. 1	9
Ouilmette Construction & Engineering Co. v. United States, 89 C. Cls. 334	9
Plato v. United States, 86 C. Cls. 665	9
United States v. Gleason, 175 U. S. 588	11
United States v. Mason & Hanger, 260 U. S. 323	12
United States v. Rice, 317 U. S. 61	6, 7
United States v. Smith, 94 U. S. 214	6
United States v. United Engineering & C. Co., 234 U. S. 236	10, 11
United States v. Wyckoff Pipe and Creosoting Co., 271 U. S. 263	7, 9
R. S. 3678	12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 50

THE UNITED STATES, *Petitioner*

v.

THE HOWARD P. FOLEY COMPANY, INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR RESPONDENT

Opinion Below

The opinion of the Court of Claims (R. 16-20) is reported in 63 F. Supp. 209.

Jurisdiction

Petitioner has invoked the jurisdiction of this Court under Section 3(b) of the Act of February 13, 1925 as amended. The judgment of the Court of Claims was entered on December 3, 1945 (R. 20).

Question Presented

The question presented is whether the United States are free from any responsibility to answer for the damages which resulted from their having delayed the respondent in the performance of its contract with them.

Statement

Respondent is an electrical contractor engaged in the business of installing of wiring and lighting systems. On June 27, 1940, it entered into a contract with the United States through the Civil Aeronautics Authority, whereby it undertook to furnish materials and perform the work for the field lighting of the Washington National Airport at Gravelly Point, Virginia for $187,000. The contract provided that the work was to be commenced as soon as practicable and that it was to be completed within 120 calendar days from the date of receipt of notice to proceed (R. 3). The Government gave notice to respondent to proceed on July 15, 1940, thus fixing the completion date as November 12, 1940 (R. 9). Respondent commenced its work immediately upon receipt of notice to proceed (R. 10) but soon after its work commenced it discovered that it would be unable to finish within the contract time because of the extended periods between releases by the defendant of areas in which it could work.

The site of the airport was created by hydraulic dredging and presented to the Government a problem of making the airport available for use before the time it would take an ordinary hydraulic fill to become sufficiently consolidated to withstand heavy traffic (R. 14). The Government's engineers were seeking to effect proper stabilization of the site in less than one year although it would ordinarily have taken four or five years for such stabilization (R. 14). They knew before the beginning of respondent's work or any major work at the site that they were confronted with the problem of quick stabilization (R. 14). The fill material

was dredged up and placed onto the site. In the process of dredging, pockets of unsatisfactory material were found and had to be replaced with other material. Where the material brought to the surface was of coarse, granular character it had to be mixed in definite proportions with fine or clay-like material in order to achieve proper compaction (R. 14-15). Paving of the runways was the last operation and preceded the respondent's operation which consisted of trenching, conduit work, wiring, installation of man-holes, hand holes, lights, and other work required under its contract. This work was done in the shoulders and taxiways and because of the necessity for maintaining stabilization could not be done before the paving (R. 15). Because of the lack of uniformity in the material deposited from the dredging operations the areas were not ready for delivery to the respondent except in an irregular manner (R. 15).

The length of time necessary to make the fill, stabilize the material, do the grading and paving was not anticipated by the Government's engineers, although they were skillful and diligent in their work and released areas to respondent as fast as they were able to do so (R. 15).

Respondent complained to the Government's representatives shortly after the commencement of the work and called their attention to the fact that delays then occurring would make it impossible to finish the work within the time limited in the contract (R. 10). The contracting officer replied, instructing respondent to keep the resident engineer and himself currently informed as to all matters of delay and stated that upon completion of the work, consideration would be given to an appropriate extension of time. Respondent complied with this procedure and both parties to the contract were fully informed as to delays (R. 10). During the course of the work the contracting officer made findings of fact pursuant to which he extended the time for performance 79 days for delays which had occurred up to and including December 12, 1940 (R. 10-12). The contracting officer stated in his findings that

> "Due to unforeseen soil conditions the Government was delayed in releasing certain stabilized areas to the paving contractor and due to delays chargeable to the paving contractor under his contract with the Government, the progress on the paving of the runways was not what had been anticipated, which resulted in preventing you from starting and performing your work in an expeditious manner."

He stated further that it had been established that the Government had by force account graded certain areas of the airport and released those areas to the paving contractor, that upon completion of the paving those areas were then released to respondent. The contracting officer found that the respondent's record was free from any act on its part which caused delay and that its work was prosecuted diligently as far as was possible for it to do so. The contracting officer further found that respondent was at no time wholly stopped from its work but that such work as it was unable to do could have been done if the progress on the runways had been all that had been expected. He found that respondent had all equipment and materials ready, or that they could have been ready for use in time to allow performance and completion of the work immediately upon release of the areas to respondent, and that no delay would have been chargeable to respondent (R. 11).

Further delays occurred subsequently and from the same causes (R. 12). At the completion of respondent's work contracting officer again made findings of fact in which he extended the contract period by an additional 78 days (R. 13-14), at the same time noting that a mathematical computation of delay amounted to 110 calendar days (R. 13). Since the actual delay during the second period had amounted to only 78 days an extension of that length of time only was granted to respondent (R. 14).

The court below found that no evidence had been proffered that the facts were contrary to those found by the contracting officer (R. 14), and that there was no evidence in the case upon which a finding could be made as to delays by the paving contractor.

The contract contained a provision (R. 5, 10) to the effect that should the respondent fail or refuse to prosecute the work with diligence or complete it within contract time the Government might by written notice terminate its right to proceed. In that event the Government was authorized to take over the work and prosecute it to completion. If the Government did not exercise its right of termination *and* the contractor was permitted to proceed with the work, liquiated damages were to be chargeable on a *per diem* basis. A provision of the same article, however, denied the Government any right to terminate the contract or to charge liquidated damages if the delays were due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including but not restricted to "acts of the Government".

Article 3 of the contract authorized the making of changes (R. 4) with appropriate adjustments in the contract price and increases or decreases in the time required for performance.

Article 4 (R. 4-5) provided that should the contractor encounter, or the Government discover "subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications" the contracting officer should modify the contract to provide for any increase or decrease of cost or difference in time resulting from such conditions.

Summary of Argument

If the United States cause a delay to the contractor in the performance of his contract, they are liable to him to the same extent as a private individual. This is true unless express provisions of the contract excuse them or unless the delays are due to the actual exercise of rights expressly reserved to the United States, such as the right to change the plans and alter the work. The United States did not exercise any of the rights which were reserved under this contract. The failure on the part of the Government was

in not proceeding with its part of the work with sufficient speed so that the work of the respondent could be completed within the agreed time.

Article 9 of the contract provides that the contractor shall not be charged with responsibility for delays attributable to a wide variety of causes, among them delays occasioned by the United States. There is nothing in Article 9 which provides that the United States shall be excused from the consequences of a breach which they commit resulting in delay to the contractor. Moreover the Government was the draftsman of the contract and it should be construed against it.

The contractor ought not to be required to speculate as to the ability of the Government to do its part of the work, particularly where the character of that work, stabilization of an hydraulic fill, is quite foreign to the work of the contractor, installation of wiring and lighting. Here the Government, itself, encountered a most common hazard in the performance of construction contracts, the underestimating of the time necessary for the work or the overestimating of its own capacity to do the work. The respondent ought not to be required to bear the burden of this erroneous calculation; on the contrary it should be entitled to rely on the Government's calculation as being correct.

Argument

The United States are liable for delays which they occasion to a contractor in the performance of his contract and are bound by the same rules which govern individuals in such instances, *United States* v. *Smith*, 94 U. S. 214. No departure from this rule was made either in *Crook Company* v. *United States*, 270 U. S. 4, or in *United States* v. *Rice*, 317 U. S. 61.

In *Crook Company* v. *United States, supra*, the contract required the furnishing and installing of a heating system in buildings which were to be constructed by another contractor. The contract completion date for the Crook Com-

pany's contract was "provisional". The contract showed that the buildings in which the system was to be installed were in progress of construction by contractors who might not keep up to time. It was apparent from the contract that if the general contractors were behind hand the Crook Company's contract would also be delayed. The contract further expressly provided that delays by the Government would be regarded as unavoidable. On the whole frame of that contract it was concluded that liability for delays resulting from tardiness of the general contractors was not to be assumed by the Government, although it was noted that the contract might have been more carefully drawn to express its intention. The form of contract which was used in the *Crook* case is quite unlike the form of contract which is involved in the present case. The decision in the *Crook Company* case turned solely upon the phrasing of the contract there involved. The language of that contract is so far dissimilar from the language of the contract in the case at bar that it offers no aid in the interpretation of the instrument under consideration.

That the *Crook* case established no general proposition of law is confirmed by *United States* v. *Wyckoff Pipe and Creosoting Company*, 271 U. S. 263. There the Government delayed the contractor by failing to furnish concrete bases and consequently prevented performance of the work for more than two years. The Government admitted its liability for damages resulting from such delays, thus recognizing the general rule that a contractee is liable to a contractor for causing delay in the performance of the latter's work.

United States v. *Rice*, 317 U. S. 61 is a case where, as in the *Crook Company* case, *supra*, the contractor had agreed to install mechanical equipment in a building which was to be constructed by another contractor. After notice to proceed was given, it was discovered that unsuitable sub-surface conditions existed on the site and it became necessary to change the location of the building with attendant altera-

tion in the specifications and work. Appropriate changes were made in the contract and there were adjustments both in price and in time of performance pursuant to those articles of the contract governing such a situation. In the case at bar there were neither subsurface or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications. In the present case the difficulty arises primarily from the fact that material which the Government obtained to create the fill varied somewhat from what was expected and as a consequence stabilization of the fill was delayed.

There is much reference in petitioner's brief to unexpected soil conditions. The contract specifically provides in Article 3 (R. 4) that changes may be made upon the discovery of "sub-surface and/or latent conditions at the site, materially differing from those shown on the drawings or indicated in the specifications"; it does not contain any reference to "soil conditions" as such. The soil conditions which were encountered in the present case were neither sub-surface nor latent; they were not the soil conditions which were covered by contract provisions. The site was constructed by hydraulic dredging (R. 14). Obviously dredging creates a void. The site could never have been built up by creating voids on one part to build up another part. The voids were not created on the site but were created in the adjacent river bed.[1] The material dredged was brought onto the site from this source. It was obviously subject to inspection by the Government's representatives as it was placed in position. In addition to this, the Government's witness in the court below testified that some of the material was brought from high ground west of the airport. This is not shown in detail in the findings which constitute the record here. In reality the soil which

[1] Brigadier General James B. Newman, who was in charge of this work, testified in the court below "Further than that, the material for construction of this airport existed in the river bed, and except for the quantity of material to be removed, offered no unusual difficulty".

was involved in this case was the material with which the Government was working in order to create the site, and that material appears to have varied somewhat from expectation. Changes were not authorized by the contract for the encountering of soil conditions of the character which developed here.

The Government argues that unanticipated difficulties do not excuse performance by a contractor, citing *Maryland Dredging Company* v. *United States*, 241 U. S. 184. That case is not in point nor is the rule cited in the least applicable where the unanticipated difficulties are the acts of the contractee. In such case the liability rests with him who created the difficulties. *Mueller* v. *United States*, 113 U. S. 153. It would be an absurd result if the Government were permitted to hold the contractor liable for either actual or liquidated damages as a result of delays which the Government itself caused.

There is a wide range of cases in which the United States have been held liable for delays occasioned a contractor. They are cases in which the United States have failed to furnish models required for the work,[2] where they have failed to approve plans and drawings or furnish other information necessary to the performance of the work.[3] There are also cases where the United States have failed to do the preliminary or commencement work and thus delayed the contractor to his damage.[4]

---

[2] *Karno-Smith* v. *U. S.*, 84 C. Cls. 110;
Largura Construction Co. v. *U. S.*, 88 C. Cls. 531;
J. L. Young Engineering Co. Ltd. v. *U. S.*, 98 C. Cls. 310;
Plato v. *U. S.*, 86 C. Cls. 665.

[3] *M. Cain Co.* v. *U. S.*, 79 C. Cls. 290;
Newport News Shipbuilding Co. v. *U. S.*, 79 C. Cls. 1.

[4] *United States* v. *Wyckoff Pipe & Creosoting Co.*, 271 U. S. 263;
Ouilmette Construction & Engineering Co. v. *U. S.*, 89 C. Cls. 334;
Gillen Co. v. *U. S.*, 88 C. Cls. 347;
Carroll v. *U. S.*, 76 C. Cls. 803.

Articles 3 and 4 of the contract have no application here. Article 3 reserves to the Government the right to make changes in the drawings and specifications and permits alterations in the structure or physical aspect of the work to be performed. Article 4 authorizes changes and adjustments under certain specified conditions, namely, the encountering of sub-surface or latent conditions at the site, materially differing from those shown on the drawings or specifications, or unknown conditions of an unusual nature materially differing from those ordinarily encountered in this character of work, and which are to be called to the attention of the contracting officer before such conditions are disturbed. Each of these articles has defined within it the limits of its application and contains as well the mechanics of its enforcement.

There remains only the question of whether or not Article 9 of the contract contains an affirmative provision relieving the United States from any liability for delays which they cause to the performance of the work. That article contemplates the failure of the contractor to finish within contract time. It is impossible to read the article to mean that the Government is authorized to terminate the contract because of delays which it caused. And this would be true even though delays by the Government were not expressly specified as delay for which the contractor is not to be held responsible.

It would be equally extravagant to say that the Government was entitled to charge liquidated damages for delays which it caused, if that right had not been expressly excluded. The consequence of this is that the exclusion of delays caused by the United States from those causes which would authorize termination of the contract is no more than a statement of the rule of law applicable to the contract without express provision. The rule has been stated in *United States v. United Engineering & C. Co.*, 234 U. S. 236, to be:

> "We think the better rule is that when the contractor has agreed to do a piece of work within a given

time, and the parties have stipulated a fixed sum as liquidated damages, not wholly disproportionate to the loss for each day's delay, in order to enforce such payment the other party must not prevent the performance of the contract within the stipulated time; and that where such is the case, and thereafter the work is completed, though delayed by the fault of the contractor, the rule of the original contract cannot be insisted upon, and liquidated damages measured thereby are waived. Under the original and first supplemental agreements, the claimant knew definitely that he was required to complete the work by a fixed date. Presumably the claimant had made its arrangements for completion within the time named. Certainly the other contracting party ought not to be permitted to insist upon liquidated damages when it is responsible for the failure to complete by the stipulated date; to do this would permit it to recover damages for delay caused by its own conduct."

The fact that delays are either unforeseen or unforeseeable or not anticipated does not mean that either party is excused because of them (*United States* v. *Gleason*, 175 U. S. 588, *Maryland Dredging Co.* v. *United States*, 241 U. S. 184) unless a specific provision in the contract so declares. Here the contract excuses delay of the contractor when caused by the Government, but there is no word excusing the Government from paying for the cost of its delay.

The contract was drawn by the United States and is its own standard form. Accordingly, it must be construed against the draftsmen to the extent that there is any ambiguity or doubt in its meaning. *Calderon* v. *Atlas S. S. Co.*, 170 U. S. 272, *American Surety Co.* v. *Pauly*, 170 U. S. 133. It is not too much to expect that if the United States intended to be relieved from liability for delays which they occasioned to the contractor, the contract would so state in plain language. It is only fair to the contractor that it be warned of this additional hazard and element of speculation if it is expected to assume it on entering into the contract. It is unfair that the United States should be in the

position of causing damage of this character to the contractor and then escaping liability therefor as a consequence of a strained construction which is nowhere found in the contract in express terms. Neither of the parties ever understood that the contract excluded liability for such damages. The contractor commenced to make its claim on this account at an early stage in the work (R. 10). The contracting officer never denied liability for such a claim but it was finally rejected because the Civil Aeronautics Authority was without jurisdiction to consider it.[5] In *United States* v. *Mason & Hanger*, 260 U. S. 323 it was said:

> "What is the import of this practical interpretation? The government does not contend that the words of the contract were dictated by statute. They are, therefore, the words of the contracting officer, to express and provide for the purpose of the government in exercise of the duty with which he was charged, and used as a declaration and measure of the rights and obligations of the parties to the contract. His subsequent conduct is necessarily to be considered a definition of them. The officer, in a sense, is a party to the contract, not only representing but speaking for the impersonality of the government. Competent, therefore, it would seem, to declare the meaning of the contract."

---

[5] The letter of the Acting General Counsel of the Civil Aeronautics Administration, denying respondent's claim for damages, referred to R. S. 3678, providing that appropriations should be applied solely to the objects for which they are made and advised that respondent's claim constituted a claim for damages for which no appropriation was available. It reasoned that there was no authority conferred on the Civil Aeronautics Administration to determine the claim, and that it had no authority to make a finding of fact concerning the claim. Respondent was advised that the decision that the Civil Aeronautics Administration was without authority to settle claims, did not constitute a decision on the merits of the claim, or upon the liability which might be imposed on the Government by the courts. This was the basis of the administrative action upon respondent's claim. Its denial was not because of untimely filing, as suggested by the footnote on page 23 of petitioner's brief. The letter mentioned was received in evidence in the court below.

It is apparent that the difficulty in the present case arose from the failure of the Government's engineers to estimate the length of time which would be required to complete the fill and stabilize the site, having in mind the possibility that material of a varying character might be brought up from the adjacent river by the dredging operation. The possibility of such a delay should have been very apparent to the Government's engineers. On the other hand, it could not have been in the least apparent to the contractor who was to install merely the electrical wiring and lighting on the site. It could not be expected that the contractor was to assume that the Government engineers had made errors or miscalculations of judgment in the time which they would require for the completion of their part of the work and certainly it must be assumed that the Government engineers thought that they had made correct calculations upon which they based the time requirement for the performance of the respondent's contract. Possibly there was excessive enthusiasm on the part of the Government engineers as to the time within which they could complete the fill and stabilize the site.

There is some disposition on the part of the Government to excuse its failure to have the site in such order as to enable the contractor to proceed, by pointing out that the acts of the Government were not wilfull or malicious. But the case is not one of tort, the question is whether the Government was bound to do what was required on its part so as not to prevent timely performance. Some effort is also made to say that Section 3-16 of the Specifications relieves the Government of liability because the contractor was required to satisfy itself as to "the general and local conditions, and all other matters which can and in any way affect the work under this contract" (R. 9). But the only thing the contractor could do was to determine that the Government itself would do other work at the site. The contractor was not bound to assume that it would be delayed by the Government.

Conclusion

The contractor should be entitled to calculate his contract price on the assumption that the Government will do its part of the work without causing such delay as to project respondent's performance beyond contract time. If the work is so projected, it is only fair that the additional costs arising as a result, be paid by the Government as a part of the value of the labor and service which it receives. This is especially true where the contract does not expressly warn the contractor that the Government is not to be considered liable for damages as the result of any delay which it causes. It is submitted that the decision of the court below was just and proper and it should be affirmed.

Respectfully,

ALEXANDER M. HERON
WILLIAM L. OWEN
Attorneys for Respondent.

SUPREME COURT OF THE UNITED STATES

No. 50.—October Term, 1946.

The United States, Petitioner, v. The Howard P. Foley Company, Inc. } On Writ of Certiorari to the Court of Claims.

[November 25, 1946.]

Mr. Justice Black delivered the opinion of the Court.

The Court of Claims rendered a judgment for the respondent and against the Government for an asserted breach of a construction contract. 63 F. Supp. 209. We granted the Government's petition for certiorari which alleged that the Court of Claims' decision was in direct conflict with *Crook* v. *United States*, 270 U. S. 4, and *United States* v. *Rice*, 317 U. S. 61. We hold that the Government's contention is correct.

The respondent, an electrical contractor, agreed for a fixed fee to supply the materials for and install a field lighting system at the National Airport, Gravelly Point, Virginia, then under construction. The agreement was embodied in a standard form Government contract. Respondent promised to complete the job within 120 days after notice to proceed. In fact the job was not finished until 277 days after notice was given. The delay came about in this way. The site of the airport was being built up from under water by a fast but then unique method of hydraulic dredging. As portions of the earth base for the runways and taxiways settled, they were to be paved and the shoulders "rough-graded." As segments of this work were finished, respondent was to move in, wire them, and install the lighting fixtures. The dredging took longer than Government engineers had anticipated, because some of the dredged soil, proving to be too unstable for runways and taxiways, had to be replaced. This in turn delayed completion of the runway sections and until each

was finished the lighting equipment for each segment could not be installed. The 157 days delay resulted from the consequently long and irregular intervals between the times when these segments were made available to respondent to do its job. But for these delays, respondent apparently could have finished its work in 120 days.

The Court of Claims considered that the Government breached its contract by failing to make the runways available in time for respondent to do its work within 120 days. The judgment against the Government was for certain overhead and administrative expenses which respondent incurred during the consequent period of delay.[1]

In no single word, clause, or sentence in the contract does the Government expressly covenant to make the runways available to respondent at any particular time. *Cf. U. S. v. Blair*, 321 U. S. 730, 733–734. It is suggested that the obligation of respondent to complete the job in 120 days can be inverted into a promise by the Government not to cause performance to be delayed beyond that time by its negligence. But even if this provision standing alone could be stretched to mean that the Government obligated itself to exercise the highest degree of diligence and the utmost good faith in efforts to make the runways promptly available, the facts of this case would show no breach of such an undertaking. For the Court of Claims found that the Government's representatives did this work "with great, if not unusual, diligence," and that "no fault is or can be attributed to them." Consequently, the Government cannot be held liable unless the contract can be interpreted to imply an unqualified warranty to make the runways promptly available.

We can find no such warranty if we are to be consistent with our *Crook* and *Rice* decisions, *supra*. The pertinent

[1] The damages awarded were for the wages respondent paid supervisory employees who stood by during the delay intervals, and for certain expenses of respondent incurred on account of these employees for unemployment and similar taxes.

provisions in the instant contract are, in every respect here material, substantially the same as those which were held in the former cases to impose no obligation on the Government to pay damages for delay. Here, as in the former cases, there are several contract provisions which showed that the parties not only anticipated that the Government might not finish its work as originally planned, but also provided in advance to protect the contractor from the consequences of such governmental delay, should it occur. The contract reserved a governmental right to make changes in the work which might cause interruption and delay, required respondent to coordinate his work with the other work being done on the site, and clearly contemplated that he would take up his work on the runway sections as they were intermittently completed and paved. Article 9 of the contract entitled "Delays-Damages," set out a procedure to govern both parties in case of respondent's delay in completion, whether such delay was caused by respondent, the Government, or other causes. If delay were caused by respondent, the Government could terminate the contract, take over the work, and hold respondent and its sureties liable. Or, in the alternative, the Government could collect liquidated damages. If, on the other hand, delay were due to "acts of the government" or other specified events, including "unforeseeable causes," procedure was outlined for extending the time in which respondent was required to complete its contract, and relieving him from the penalties of contract termination or liquidated damages.

In the *Crook* and *Rice* cases we held that the Government could not be held liable for delay in making its work available to contractors unless the terms of the contract imposed such liability. Those contracts, practically identical with the one here, were held to impose none. See also *U. S.* v. *Blair, supra*. The distinction which the Court of Claims found between this and the prior cases is not in point. It seems to be this: In the *Crook* and *Rice* cases

the Government had a prime and a subcontractor; the Government reserved a right to make changes by which the prime contractor must thereafter be governed; the Government exercised this right; these changes made it impossible for the prime contractor and ultimately the subcontractor to do their work in time; since the Government had reserved the right against the prime contractor to make these changes, and the subcontractor knew this, the Government was not contractually responsible for the delay. Therefore it is suggested that the subcontractor in the *Rice* and *Crook* cases could know in advance that the performance time was "provisional" whereas here the contractor had reason to believe that it was certain. But in this case there is ample indication both in the extrinsic facts and in the contract terms that changes and delays were anticipated and remedies therefor provided. The contractor here only lacked the one additional indication that changes were anticipated which he could have read from the prime contract had there been a prime contract and if a prime contract had been available for him to read. If this be a distinction, it is a distinction with no significant difference. This contract, like the others, shows that changes and delays were anticipated and provided for. The question on which all these cases turn is, did the Government obligate itself to pay damages to a contractor solely because of delay in making the work available? We hold again that it did not for the reasons elaborated in the *Crook* and *Rice* decisions.

Reversed.

MR. JUSTICE REED, MR. JUSTICE FRANKFURTER, and MR. JUSTICE JACKSON dissent. It is admitted that the Government had given the contractor "notice to proceed" which in our opinion had the legal consequences set forth in the opinion of the court below whose judgment we would affirm.